United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2140
To be argued by
JANE E. BLOOM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES SNYDER,

Plaintiff-Appellee,

-against-

PETER PREISER, individually and in his capacity as Commissioner, New York State Department of Correctional Services; VINCENT TERNULLO, individually and in his capacity as Superintendent of Fishkill Correctional Facility and ROY BOMBARD, individually and in his capacity as Deputy Superintendent of Fishkill Correctional Facility,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS
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Defendants-Appellants.

BRIEF FOR PLAINTIFF-APPELLEE

Questions Presented

1. Did defendants violate plaintiff's right to due process under the Fourteenth Amendment to the United States Constitution when he was removed from a medium security institution Work Release Program and transferred to a maximum security institution in March, 1974 without procedural due process protections?

2. Did defendants violate plaintiff's right to due process under New York Correction Law and New York Correction regulations, 7N.Y.C.R.R. §253, when he was removed from a medium security institution Work Release Program and transferred to a maximum security institution in March, 1974?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York (Motley, J.) dated October 20, 1975. The District Court ordered defendants to return plaintiff to the Work Release Program at Fishkill Correctional Facility in which he participated from September 1973 to March, 1974, to not remove plaintiff from the program except in compliance with the procedures set forth in 7 N.Y.C.R.R. 253 and current standards of due process as required by the Fourteenth Amendment to the United States Constitution, and to expunge all records of plaintiffs transfer from Fishkill to Greenhaven Correctional Facility.

This civil rights action, brought pursuant to 42 U.S.C. §1983, was commenced in District Court on December 19, 1975 when plaintiff filed a verified complaint and motion for a preliminary injunction seeking his return to the Work Release Program at Fishkill. Plaintiff contended that the procedures utilized in removing him from the Work Release Program violated the due process clause of the Fifth and Fourteenth Amendments and his Sixth Amendment right to counsel. On January 6, 1975, defendants filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted.

On January 10, 1975, oral argument on the plaintiff's motion for a preliminary injunction and defendant's motion to dismiss was heard before Honorable Constance Baker Motley. On January 21, 1975, the District Court ordered that an evidentiary hearing be held on the motion for a preliminary injunction. An evidentiary hearing was held on May 15, 16, and 19, 1975 before the Honorable Constance Baker Motley. The court, sua sponte, consolidated the trial of the case with the hearing on the motion for a preliminary injunction.

In Findings of Fact and Conclusion of Law dated September 19, 1975 and an Order dated October 20, 1975, the District Court granted judgment to the plaintiff and denied defendants' motion to stay the decision and order. On November 3, 1975, this court denied defendants' motion for a stay pending appeal.

STATEMENT OF FACTS

A. Introduction

On February 28, 1969, plaintiff was sentenced to an indeterminate term of imprisonment to have a maximum term of 15 years for the crime of manslaughter first degree. Plaintiff was incarcerated in maximum security institutions from February, 1969

until August, 1973 when he was transferred to the Fishkill Correctional Facility and placed in the Work Release Program. As a participant in the Work Release Program at Fishkill, plaintiff attended Dutchess Community College in Poughkeepsie, New York each day and worked towards obtaining his associate degree. (A-48)[1] In March, 1974, plaintiff was removed from the Work Release Program for alleged program violations and on April 15, 1974 was returned to Greenhaven Correctional Facility, a maximum security institution.

Testimony at the trial demonstrated that plaintiff's removal from the Work Release Program and return to a maximum security institution in April, 1974 constituted a major deprivation and change in the conditions of his confinement. The testimony also showed that when plaintiff met with the Temporary Release Committees in January, February, and March, 1974, he never received the following procedural protections:

(1) written or adequate oral notice of the charges placed against him;

(2) an opportunity to prepare a defense to the charges or assistance in the presentation of his case;

(3) adequate notice of the decisions of the hearings.

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1 Page references preceded by A refer to the Appendix.

B. Plaintiff's Removal from the Work Release Program Constituted a Major Deprivation.

It is undisputed that plaintiff's removal from the Work Release Program constituted a major change in the conditions of his confinement. In the Work Release Program, plaintiff was permitted to leave the medium security institution for up to fourteen hours per day for his educational program at Dutchess Community College. New York Correction Law, Article 26, Section 851(3) and(7). (A-48, 49) He was permitted to eat in restaurants off the campus. (A-50) He was permitted to shop in stores in the area while going to and from school. (A-242) He was allowed to leave the institution about one week-end each month for a furlough. (A-49)

After plaintiff was returned to Greenhaven, he was incarcerated within the walls of a maximum security institution for 24 hours each day. His educational program was disrupted and he lost all credit for courses he had been taking during the Spring semester of 1974. (A-66) He was not permitted to participate in any kind of release programs (A-71) He was not permitted to be released for furloughs. (A-68-71) He was denied parole release on two occasions in April, 1974 and April, 1975. (A-73)[2]

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[2] The District Court found that

> "Since his transfer plaintiff has been denied parole on at least two occasions. It is likely that the decision of the temporary release committee that plaintiff violated the regulations and his resultant transfer deprived plaintiff of an earlier parole which he would have otherwise been given. (A-291)

The District Court properly found that

> "the transfer at issue involved a major deprivation of liberty, in that plaintiff was transferred to a more secure prison, was no longer able to participate in the work release program and was likely to be deprived of earlier parole thereby leading to a longer period of incarceration than would otherwise be the case..." (A-289)

C. Plaintiff did not Receive Procedural Due Process Protections When He Met with the Temporary Release Committee in January, February, and March 1974.

1. Plaintiff Never Received Adequate Notice of the Charges Placed Against Him.

It is undisputed that plaintiff received neither oral nor written notice of the charges placed against him at the January, 1974 meeting of the Temporary Release Committee where he and other inmates were reprimanded for tardiness in returning to the prison in the evening. (A-100, 101, 157, 197) The District Court properly found that plaintiff "received neither written nor oral notice of the reasons for which he was called before the committee in January." (A-281)

It is undisputed that plaintiff received no written notice of the charges placed against him at the February, 1974 meeting. While Albert Holumzer, Correction Counselor at Fishkill testified that he had a discussion with the plaintiff prior to the

February meeting, he indicated that "I don't think I informed him of the specific charges or of the date, you know, when the hearing would be held." (A-130) Anthony DaSilva, Chairman of the Temporary Release Committee testified that, "The charges were not discussed as specific charges." (A-163) The District Court properly found that plaintiff "...was not informed of the specific charges against him prior to the February meeting." (A-282)

Finally, it is undisputed that plaintiff received no written notice of the charges placed against him at the March, 1974 meeting. Plaintiff testified he received no oral notice of any charges prior to the meeting. (A-53-55) The District Court properly concluded that the defendants' proof that plaintiff received oral notice that he was charged with violating the bounds of his confinement "...was less than conclusive evidence that Snyder had, in fact, been informed." (A-282) Anthony DaSilva testified that plaintiff was never given notice of other charges that were discussed with him at the meeting such as smuggling letters and "his general history in the place." (A-167)

It is significant that the District Court found that

> "The testimony at the trial makes clear that plaintiff was transferred as a result of his general adjustment to the work release program and previous program violations, as well as the violation of the bounds of confinement discussed at the March meeting." (A-280)

The previous program violations included:

> "...buying a hearing aid cord and charging it to a corrections counselor, charging a magazine subscription, buying batteries for his hearing aid without permission and going into a clothing store in the middle of the day when he was supposed to be in school." (A-280-281)

Plaintiff was never provided with a hearing where he was given notice of these charges or where these charges were even discussed.

2. Plaintiff Had No Opportunity to Prepare a Defense to the Charges or Have Assistance in the Preparation of His Case.

The evidence indicates that plaintiff had no opportunity to prepare a defense to the charges because he was never given adequate notice of the charges. Plaintiff had no opportunity to have assistance in the preparation or presentation of his case. (A-181) The District Court noted in its Findings of Fact that plaintiff was hampered by hearing difficulties at the meetings of the the Temporary Release Committee. (A-283) The District Court properly found that plaintiff "...could not adequately prepare a defense to those charges..." (A-283) and "...was never given the opportunity to have a lawyer or anyone else assist him at these meetings." (A-283) There was also evidence that plaintiff's hearing problems hampered his ability to defend the charges. (A-62-64)

3. Plaintiff Never Received Adequate Written Notice of the Decisions of the Committees.

The District Court properly found that there was no evidence that plaintiff received any formal notification of the decisions of the January and February, 1974 Temporary Release Committees. While defendants now assert that plaintiff was warned in February, 1974 that he might be removed from the program, evidence to support these contentions is lacking. Plaintiff clearly never admitted that he received such a warning. Defendant's reliance on pages A-139, 195-196 to support this contention is misplaced.

The District Court found that plaintiff received written notice of the decision of the March, 1974 meeting (A-283, 262). However the Court concluded that plaintiff "...was not given adequate notice as to the reasons for the disposition." (A-290)

ARGUMENT

I. DEFENDANTS VIOLATED PLAINTIFF'S RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN HE WAS REMOVED FROM A MEDIUM SECURITY INSTITUTION WORK RELEASE PROGRAM AND TRANSFERRED TO A MAXIMUM SECURITY INSTITUTION IN APRIL 1974 WITHOUT MINIMAL DUE PROCESS PROTECTIONS.

A. Introduction

It is fundamental that imposition of grievous loss pursuant to governmental action requires due process safeguards. Joint Anti-fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring); Goldberg v. Kelly, 397 U.S. 254 (1970); Haines v. Kerner, 404 U.S. 519 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Preiser v. Rodriquez, 411 U.S. 475 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). In terms of prison life, grievous loss is understood as a major change in conditions of confinement Wolff v. McDonnell, 94 S. Ct. 2963 n. 19 (1974).

Plaintiff's transfer from the Fishkill work release program to Greenhaven was a most grievous loss under constitutional standards. The District Court found that life at Greenhaven, a maximum security institution, was substantially worse than at the work release program at Fishkill, a medium security institution, with respect to physical restraints in the institution and liberty

of movement outside the institution. It is clear that plaintiff's transfer from the work release program to Greenhaven constituted a more grievous loss than the loss suffered by an inmate transferred from a medium to a maximum security institution.

The District Court properly found that plaintiff was entitled to due process guarantees as a result of the grievous losses described above. It is significant to note that the District Court confined its due process analysis to the due process standards applicable to the plaintiff in March, 1974 (A-288). The Court's Conclusions of Law do not deal in any respect with current due process standards.

Plaintiff maintains that the District Court correctly determined that he was entitled to the following due process protections in March, 1974:

(1) adequate notice of all the claimed program violations which cumulatively led to his transfer;

(2) an effective opportunity and assistance to present his case;

(3) written notice as to the reasons for the decision.

Plaintiff submits that whether the due process standards found in Morrissey v. Brewer, 408 U.S. 471 (1972) or Newkirk v.

Butler, 364 F. Supp. 497 (S.D.N.Y. 1973), modified, 499 F. 2d 1214 (2d Cir. 1974)[3] or Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971), cert. denied 404 U.S. 854 (1971) are applied, defendants failed to provide him with adequate due process protections. The District Court's application of Morrissey supra will first be discussed. The procedures required by Newkirk supra, and Sostre, supra will then be discussed.

B. The District Court Correctly Applied the Due Process Protections Set Forth In Morrissey v. Brewer to the Removal of Plaintiff From the Work Release Program in March 1974.

The District Court clearly stated that the plaintiff should not have been removed from a work release program and returned to a maximum security institution without being afforded "...the due process standards of notice and opportunity to be effectively heard enumerated in Morrissey." (A-289) From 1972 to the spring of 1974, many courts determined that the due process requirements set forth in Morrissey v. Brewer, 408 U.S. 471 (1972)[4] were applicable to the transfer of an inmate from

[3] While Newkirk has since been vacated as moot by the Supreme Court in 422 U.S. 395 (1975), reference is made to the Second Circuit decision because of its precedential value in March 1974, the period of time in question.

[4] The Supreme Court decided at 489 that minimum requirements of due process included: (continued)

one institution to another. In Millemann & Millemann, The Prisoner's Right To Stay Where He Is: State & Federal Transfer Compacts Run Afoul of Constitutional Due Process, 3 Cap. Univ. L.Rev. 223, 227 (1974), it was noted:

> "The courts which have invalidated summary interstate inmate transfers have adopted the conceptual analysis of Morrissey. Extending Morrissey beyond its express holding, they have found that the transfer of an inmate from one institution to another, hundreds of miles away, constitutes 'grievous loss' and that the failure to afford the transferred inmate a hearing to contest his transfer is neither in the state's interest nor is it consistent with the goal of rehabilitation."

In Gomes v. Travisono, 353 F. Supp. 457 (D.R.I. 1973), modified 490 F. 2d 1209 (1st Cir. 1974), the court determined that rigorous requirements of due process were required when inmates were subjected to interstate transfers because "transfer through diminution of parole and rehabilitative program possi-

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[4] continued:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board... and (f) a written statement by the fact finders as to the evidence relied on, and reasons for revoking parole.

bilities, may well lead to a longer period of incarceration of the inmate than would otherwise be the case." Gomes at 468.

The court held at 472 that due process required that:

> "Prior to transfer (absent an emergency situation or compelling state interest), the inmate is given written notice of the charge or reasons for transfer; this charge or reason is investigated and reviewed by a superior officer; a hearing on the question of transfer is held before an impartial board; administrative review of the charge is available; and a record of the proceeding is kept. At the hearing the inmate must be read the charge and given the opportunity to respond, which opportunity shall include the right to call and examine witnesses and to have the assistance of a lay advocate. The decision to transfer must be based on substantial evidence."

While the 1st Circuit decision was vacated by the Supreme Court, sub nom, Travisono v. Gomes, 418 U.S. 909 (1974) and remanded for further consideration in light of Wolff v. McDonnell, 418 U.S. 539 (1974), this did not occur until July 8, 1974. The District Court properly considered and applied the standards set forth by the district court and initial appellate court decisions in Gomes, supra to this case in dealing with the due process requirements in March, 1974.

In 1973, the court in Ault v. Holmes, 369 F. Supp. 288 (W.D. Ky. 1973) dealt with the interstate transfer of prisoners and noted at 291 that "where there is a serious change in a prisoner's confinement, procedures relating thereto must comport with basic due process." The court decided at 295 that due process required that:

> Prior to transfer (absent an emergency situation or compelling state interest), the inmate is given written notice of the charge or reasons for transfer; this charge or reason is investigated and reviewed by a superior officer; a hearing on the question of transfer is held before an impartial board; administrative review of the charge is available; and a record of the proceeding is kept. At the hearing the inmate must be read the charge and given the opportunity to respond, which opportunity shall include the right to call and examine witnesses and to have the assistance of a lay advocate. The decision to transfer must be based on substantial evidence.

While this decision was vacated and remanded for consideration in light of Wolff v. McDonnell supra by the Sixth Circuit, 506 F. 2d 288 (6th Cir. 1974) on November 15, 1974, in March 1974 the district court decision reflected the prevailing standard of due process to be applied in this case.

The court in Hoitt v. Vitek, 361 F. Supp. 1238 (D. New Hamp. 1973), aff'd. 502 F. 2d 1158 (1st Cir. 1973) also

applied strict requirements of procedural due process. The district court noted at 1253 that prior to transfer the inmate must be given

> "(1) Prior written notice of the charges or basis upon which recommendation to transfer is being made must be given to an inmate three or more days before the time set for hearing.
>
> (2) The inmate must be allowed the assistance of a lay advocate of his choice in preparation for the hearing and at the time of the hearing."

The court also required that a tape recording of the proceedings be made, that the inmate be given the right to present evidence and cross-examine witnesses, and that a written finding of fact upon which a decision is based be made and given to the prisoner.

In Djonne v. Schoen, 217 N.W. 2d 508 (Sup. Ct. Minn. 1974) the court determined that the Morrissey standards of due process should apply when an inmate was removed from a work release program. In a study entitled Temporary Release in New York State Correctional Facilities, 38 Alb. L. Rev. 693, 732 (1974) it is noted that:

> "In Morrissey v. Brewer, the Supreme Court stated without qualification that the revocation of parole must be carried out consistently with certain requirements of due process regardless of whether parole is considered a right or a privilege. The programs of parole and temporary release are sufficiently similar to apply the same standards."

See also White v. Gillman, 360 F. Supp. 64 (S.D. Iowa 1973), (transfer of inmate from reformatory school to more secure state prison); Bundy v. Cannon, 328 F. Supp. 165 (D. Mary. 1971), (transfer of inmates from minimum and medium security institutions to maximum security prisons); United States ex rel Neal v. Wolfe, 346 F. Supp. 569 (E.D. Penn. 1972), (demotional disciplinary transfer); Colligan v. United States, 349 F. Supp. 1253 (E.D. Mich. 1972), (Morrissey applied to prison disciplinary proceedings); Stewart v. Jozwiak, 346 F. Supp. 1062 (E.D. Wis. 1972); Cluchette v. Procunier, 328 F. Supp. 767 (N.D. Calif. 1971), (Morrissey applied to prison disciplinary proceedings);[5] United States ex rel. Miller v. Twomey, 479 F. 2d 701 (7th Cir. 1973), cert. denied 414 U.S. 1146, (1974) (Morrissey applied to prison disciplinary hearings); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973), vacated on other grounds 491 F. 2d 417, cert. denied, 416 U.S. 992 (1974) (Morrissey applied to prison disciplinary hearings.)

The District Court properly applied Morrissey supra to plaintiff's revocation from a work release program in March 1974 given the grievous loss as well as the governmental and private

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5 The district court opinion was later modified by the 9th Circuit in 497 F. 2d 809 (9th Cir. 1974) and 510 F. 2d 613 (9th Cir. 1975). However the district court opinion reflects the requirements of due process in March 1974.

interests in question. It is elemental that

> "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

Defendants maintain that plaintiff was not entitled to present evidence and witnesses, confront and cross-examine adverse witnesses, and have the assistance of counsel. A consideration of the competing governmental and private interests suggest that defendants are in error.

While an individual in a work release program does not enjoy all the liberties of a parolee, he or she is free to work, attend school, and shop for fourteen hours each day outside a correctional institution.[6] In Work Release-The New York City Program A Preliminary Public Policy Paper, Community Service Society of New York (July 1974) the purpose of work release programs in New York is defined as follows at 12: "The central administrative staff conceive the purpose of the program to be provision of more humanitarian alternatives to traditional incarceration, rehabilitation of the offender through integration into his community and provision of a broad spectrum of services."

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[6] "The first formal work release program was initiated by Vermont in 1906, followed in 1913 by Wisconsin with enactment of the Huber Law. Broad use of work release began in most states in the 1960's. (continued)

General Orders No. 20 (July 13, 1972) which establishes "standard operating procedures governing the operation of community residential facilities" states that:

> "The specific purpose for the establishment of a Community Residential Facility is to provide an inmate for whom there is reasonable cause to believe he will honor his trust, the opportunity for the following: (a) Employment, education or training. (b) Continued or assumed family responsibilities through contribution to family support. (c) Payment of costs incident to confinement. (d) Accumulation of savings to see him through the initial period after release. (e) Payment of fines and forfeitures. (f) Acquiring the self-respect that flows from self-support and becoming a contributing member of society. (g) Demonstrating ability and trustworthiness to gain or regain community acceptance."

While 33 inmates participated in work and educational release programs in 1970, 1,596 participated in 1974. In a recent study of release programs in New York State, Community Oriented Correctional Programs-Partial Confinement and Temporary Release in New York State, Community Service Society of New York (1975), it is noted at 92 that "While numbers of participants are still low--about 2.5 percent of the inmate population at any time--the Department of Correctional Services has increasingly demonstrated

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[6](continued) New York State first enacted work release statutes for New York City and other local jurisdictions in 1968 and for the State prison system in 1969." Community Oriented Correctional Programs-Partial Confinement and Temporary Release in New York State, Community Service Society of New York (1975) p. 13.

its commitment to the concept of temporary release." In hearings before New York State Committee on Penal Institutions on Proposed Work Release Legislation, April 5, 1968, the objectives of the Work Release statutes were described as follows:

> "Witnesses reported that the federal government and twenty-five states had adopted work release as a rehabilitative tool. Emphasis was placed on the need to better 'prepare [the inmate] for his return to society,' and lessen the high rate of recidivism. Work release was described as a 'technique designed to increase the effectiveness of correction programs by making the transition from confinement...to freedom...a gradual, carefully supervised process.' Many stressed that work release was not a panacea, but added that it was a valid new approach."
> Davis et al, Temporary Release in New York State Correctional Facilities, 38 Alb. L. Rev. 693, 707-8 (1974).

Given the philosophy behind temporary release programs and the large measure of freedom granted to the participants, an individual's interest in avoiding revocation is substantial. Revocation works an immediate "...change in the conditions of his liberty." Wolff v. McDonnell, 94 S. Ct. 2963, 2977 (1974). The state's interest in determining whether or not an individual has violated the terms of the program can best be served by incorporating due process protections into the revocation hearing process.

Plaintiff should have been permitted to present evidence, call witnesses, cross-examine adverse witnesses, and have assistance.

Plaintiff's need for assistance in the presentation of his case was particularly important in view of his hearing difficulties. The District Court noted in its Findings of Fact that there was an indication that plaintiff was hampered at the three meetings by his hearing problems. (A-283) In Rhem v. Malcolm, 371 F. Supp. 594, 632 (E.D.N.Y. 1974), the court stated that counsel substitutes must be allowed in disciplinary proceedings when "the detainee appears incapable of speaking effectively for himself."

The charges which led to plaintiff's removal from the work release program involved his activities while he was outside the institution. The evidence and witnesses needed to be collected and presented by the plaintiff were no different from those needed by a parolee in a parole revocation proceeding.

The interest of the state in summary transfers is minimal at best. Since rehabilitation is a primary interest of the state, a full hearing to determine the necessity for revocation and transfer serves the state's interest as well as the inmate's needs. The defendants have not demonstrated how the security risks in a work release revocation hearing differ from those in a parole revocation proceeding. In any event, the governmental interest in security does not outweigh the need to assure that the finding of a violation will be based on all available facts. See generally

Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 227, 242-244 (1970); Judicial Intervention in Prison Discipline, 60 J. Crim. L.C. and P.S. 200 (1974); Millemann, Due Process Behind the Walls, 1 Prisoner's Rights Sourcebook 79, 92 (1973); Broude, The Use of Involuntary Inter-Prison Transfer as a Sanction, 3 Am. J. Crim. Law (Fall 1974).

C. Defendants Failed To Provide Plaintiff With the Most Minimal Due Process Protections Prior to His Removal From The Work Release Program in March 1974.

The District Court properly noted that defendants failed to provide plaintiff with even the minimum procedural protections outlined in Newkirk v. Butler, 364 F. Supp. 497 (S.D.N.Y. 1973), modified, 499 F. 2d 1214 (2d Cir. 1974) or Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971). In Newkirk, supra the court considered a prisoner's due process rights when he was transferred from a medium to a maximum security institution. The Second Circuit affirmed the lower court's determination that due process requires that prisoners "... are entitled to know, before punishment is imposed, the charges against them, and to explain their behavior, before a relatively impartial tribunal." Newkirk v. Butler, 364 F. Supp. 497, 503. In Sostre v. McGinnis, 442 F. 2d 178, (2d Cir. 1971), the Second Circuit considered the standards of due process to be applied before an inmate may be placed in segregation. The court decided at 198 that:

> "If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined... In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him..., and afforded a reasonable opportunity to explain his actions."

Defendants failed to inform plaintiff of the charges placed against him and thereby gave him no meaningful opportunity to explain his actions. Defendants do not even argue that plaintiff has given adequate notice of charges at the January 1974 meeting. The District Court Findings of Fact indicate that plaintiff "...was not informed of the specific charges against him prior to the February meeting. (A-282) The District Court Findings of Fact indicate that plaintiff never received written notice of the charges placed against him at the March meeting. The Court found the defendants' evidence that plaintiff received oral notice "...less than conclusive evidence..." (A-282) that plaintiff had been informed.

Defendants' rationalization that plaintiff admitted receiving a speeding ticket and that this offense could have resulted in his removal from the program does not cure the procedural deficiencies that occurred in March 1974. The argument

does not alter the fact that defendants' own witnesses testified that plaintiff was not removed from the program because of the speeding ticket alone. The argument also does not alter the District Court Findings of Fact that "...plaintiff was transferred as a result of his general adjustment to the work release program and previous program violations, as well as the violation of the bounds of confinement discussed at the March meeting." (A-280) It is undisputed that plaintiff never received notice that his general adjustment to the program and his previous alleged program violations would be considered at the March 1974 meeting. Defendants' failure to provide plaintiff with notice of charges against him violates the most minimal requirements of due process.

II. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS UNDER NEW YORK CORRECTION LAW AND NEW YORK CORRECTION REGULATIONS, 7 N.C.R.R. §253, WHEN HE WAS REMOVED FROM A MEDIUM SECURITY INSTITUTION WORK RELEASE PROGRAM AND TRANSFERRED TO A MAXIMUM SECURITY INSTITUTION IN MARCH 1974.

Plaintiff maintains that the District Court correctly decided that the 'Procedures for Implementing Standards of Inmate Behavior', 7 N.Y.C.R.R. §250 et seq. were applicable to the March 1974 hearing which resulted in his removal from the Work Release Program.

New York Correction Law Article 26 is entitled 'Temporary Release Programs for State Correctional Institutions' and governs the procedures to be utilized in the administration of Temporary Release programs. Pursuant to §851(9), a temporary release program means "a work release program", a "furlough program", a "community services program", an "industrial training leave", and "educational leave", or a "leave of absence". While Correction Law §853(8) states the "Participation in a temporary release program shall be a privilege", it is evident from Correction Law §854 that the conduct of inmates participating in the temporary release program is governed by the general disciplinary rules and regulations applicable to inmates in all New York State prisons. Correction Law §854(2) provides as follows:

> "2. If the inmate violates any provision of the program, or any rule or regulation promulgated by the commissioner for conduct of inmates participating in temporary release programs, he shall be subject to disciplinary measures to the same extent as if he violated a rule or regulation of the commissioner for conduct of inmates within the premises of the institution."

The term "institution" is defined in §851(1) as "any institution under the jurisdiction of the state department of correctional services".

Correction Law §853(8) clearly states that the Temporary Release Committee shall conduct revocation hearings.

> "...The superintendent of the institution may at any time, and upon recommendation of the temporary release committee or of the commissioner or of the chairman of the State Board of Parole or his designee shall, revoke any inmate's privilege to participate in a program of temporary release."
> Section 853(8)

However, this section does not authorize the Temporary Release Committee to use any procedures or methods it desires and devises to revoke inmates from the Temporary Release programs. While the defendants contend at page 23 of their brief that "Violation of temporary release regulations were sui generis and were, at that time, governed by a special procedure", the defendants fail to outline the procedure and specify the statute or regulation that authorized such procedure.

Plaintiff maintains that 7 N.Y.C.R.R. §250 et seq. governed the procedures of Temporary Release Committees in March 1974. In the 'Procedures for Implementing Standards of Inmate Behavior', 7 N.Y.C.R.R. §250 et seq, Part 250 sets forth the 'Scope and Interpretation of Rules and Regulations in this Chapter. Section 250.1 'Applicability' states:

> (a) The rules and regulations set forth in this Chapter establish procedures to supplement the department's ordinary programs for inmate indoctrination, guidance, counseling and training. They are to be applied for the following purposes:
> (1) Implementation of standards of behavior where an inmate:

(i) violates a rule or regulation governing his behavior;
(ii) fails or refuses to comply with an instruction given to him by an employee of the department acting within the scope of his official duties in governing such instruction; or
(iii) attempts to escape or escapes or engages in any other unlawful conduct; and
(2) Administration of procedures for granting good behavior allowances ("good time").
(b) The provisions of this Chapter shall apply to all correctional facilities in the department. They do not apply to the institutions for the mentally ill and the institutions for the retarded in the department.

Section 250.3 provides that "(a) In any case where a situation to which these rules and regulations apply is not covered by law, or by a specific rule or regulation, policy statement, or administrative order of the department, the procedure shall be as provided in this section". Thus an inmate in a Temporary Release program is subject to the disciplinary rules and regulations set forth in 7 N.Y.C.R.R. §250 et seq. which apply to all correctional facilities.

Plaintiff contends that the procedures outlined in 7 N.Y.C.R.R. §253 should have been utilized at the March 27, 1974 hearing which resulted in his removal from the Work Release program. 7 N.Y.C.R.R. §253 govern procedures at Superintendent's Proceedings. The Superintendent's proceeding must be used when

an inmate is charges with a major rule violation and can be punished with the following types of disciplinary measures: reprimand, loss of one or more specified privileges for a specified period, temporary or permanent change of program, confinement to cell or room in a special housing unit for a period not exceeding 60 days, and loss of good time. The adjustment committee, 7 N.Y.C.R.R. §252, is only used to deal with minor rule violations. The adjustment committee only has the power to take the following actions:

> "(1) Loss of one or more specified privileges for a specified period not exceeding 30 days;
> (2) Confinement to his cell or room continuously or on certain days, or during certain hours for a specified period not exceeding two weeks;
> (3) Where the inmate's behavior is such that his presence in a general housing unit disrupts the order and discipline of that unit or is inconsistent with the best interests of the facility or of the inmate, confinement in a special housing unit for a specified period of time not exceeding one week. 7 N.Y.C.R.R. §252.5

Plaintiff maintains that because the March 27, 1974 meeting dealt with charges of major program violations, the Superintendent's proceeding procedures should have been utilized. Anthony Da Silva testified that the charge of violating the bounds of confinement would be considered a major program violation. (A-168). Albert Holumzer testified that the charge of leaving for the library without permission would be considered

a major program violation. (A-128). Robert Fisher testified that the charge of participating in the Heart Fund Drive without permission would be considered a major violation. (A-199, 200).

Plaintiff contends that because the Temporary Release Committee has the power to deal with major program violations and remove inmates from program as does the Superintendent's proceeding, the procedural protections provided for the Superintendent's proceeding must be utilized by the Temporary Release Committee. Anthony Da Silva testified that the Temporary Release Committee had the power to remove inmates from programs as did the Superintendent's proceeding. He testified at trial (A-177-178):

> Q. My question is would a Temporary Release Committee be used for more serious violations as would a Superintendent's Proceeding?
> A. Be used for serious violations of work release programs, yes.
> Q. The Temporary Release Committee would have some of the same powers that a Superintendent's Proceeding would have in that it can remove people from programs or recommend removal?
> A. It just recommends, right.

Plaintiff contends that the District Court correctly concluded that

> "Moreover, it is clear that the deprivation involved in this case - transfer to a more secure prison, loss of the privilege of participating in a release program and possible

> loss of earlier parole - is as or more substantial than the sanctions and dispositions which are authorized by the statute after a superintendent's proceedings. §253.5 supra. The protections afforded in such hearings are, therefore, applicable to this case." (A-286).

Defendants contend that because the Department of Correctional Services did not issue a memorandum requiring that removal from a temporary release program be authorized only after a Superintendent's Proceeding under 7 N.Y.C.R.R., §253 until May 12, 1975, these regulations were not binding in March 1974. Aside from the circular nature of this reasoning, it is clear that Federal Courts are not bound by the Department of Correctional Services definitions of procedural due process under the Fourteenth Amendment of the United States Constitution. The defendants also point out that no reported state cases concerning removal from work release existed in March 1974. However, the absence of state cases does not justify the absence of due process protections, particularly when the transfer issue had been litigated in many other forums.

Defendants concede that plaintiff was not afforded the due process protections found in 7 N.Y.C.R.R. §253 (A-180-181). Plaintiff maintains that his due process rights under New York state statutes and regulations were violated by defendants in March 1974.

CONCLUSION

For the above-stated reasons, the order of the District Court should be affirmed.

DATED: Poughkeepsie, New York
February 5, 1976

Respectfully submitted,

Jane E. Bloom

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES SNYDER,

Plaintiff-Appellee,

-against-

PETER PREISER, individually and in his capacity as Commissioner, New York State Department of Correctional Services; VINCENT TERNULLO, individually and in his capacity as Superintendent of Fishkill Correctional Facility and ROY BOMBARD, individually and in his capacity as Deputy Superintendent of Fishkill Correctional Facility,

Defendants-Appellants.

AFFIDAVIT

75-2140

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

Barbara Parmenter being sworn says:

1. I am not a party to the action, am over 18 years of age and reside at 5 Hearthstone Drive, Wappingers Falls, New York.

2. On February 6, 1976, I served 2 true copies of the annexed Brief for Plaintiff-Appellee by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depositiory of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated herein: David Birch, Deputy Assistant Attorney General, Two World Trade Center, New York, New York.

Barbara Parmenter
BARBARA PARMENTER

Sworn to before me on

February 6, 1976

Jane Ellen Bloom
NOTARY PUBLIC

JANE ELLEN BLOOM
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN DUTCHESS COUNTY
COMMISSION EXPIRES MARCH 30, 1976